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IN THE

Supreme Court of the United States

October Term, 1971

Docket No. 71-489

AMERICAN AIRLINES, INC.,
Petitioner,

and

ALLIED PILOTS ASSOCIATION,
Intervener-Petitioner,

v.

CIVIL AERONAUTICS BOARD,
Respondent,

and

MASTER EXECUTIVE COUNCIL OF THE PILOTS OF TRANS CARIBBEAN AIRWAYS,
Intervener-Respondent.

SUPPLEMENTAL BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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SUPPLEMENTAL BRIEF

In accordance with Rule 24(5) of this Court's rules, U. S. Sup. Ct. R 24(5), this Supplemental Brief is submitted concerning the case of *Norfolk & Western Railway Co.* v. *Nemitz*, 78 LRRM 2723 (November 15, 1971), which was unreported at the time of the submission of Intervener-Petitioner's Petition for Certiorari. Since this case was cited by the Respondent but does, in fact, support this petition, we believe it is appropriate to comment upon it to the Court.

The *Norfolk* case involved the consolidation of two railroads and arose under provisions of the Interstate Commerce Act, 49 U.S.C. §1, *et seq.* In that case, the acquiring railroad entered into an agreement with a number of unions representing employees on the acquired railroad, prior to the approval of the consolidation by the Interstate Commerce Commission, whereby the employees of the acquired railroad were guaranteed employment on the acquiring railroad in addition to other job-related guarantees. In approving the consolidation the I.C.C. stated that the aforesaid agreement was made pursuant to and in conformity with a section of the Interstate Commerce Act requiring the protection of affected employees following a merger or consolidation. Subsequent to the consolidation, a group of employees formerly employed by the acquired railroad claimed that they had been adversely affected by the consolidation and claimed that certain guarantees intended to compensate them therefor were not being lived up to by the railroad. Arbitration pursuant to the collective agreement was agreed upon. However, at that point, the railroad and the union representing its employees entered into an agreement which substantially reduced the benefits previously guaranteed the grieving employees. This Court held that the post-consolidation agreement abrogated the guarantees agreed upon prior to the merger and incorporated in the I.C.C.'s protective conditions as a condition of the merger. In so holding, this Court stated:

> "When there is a collective agreement and the Commission, as here, adopts or approves it, the 'notwithstanding' sentence of §5(2)(f) is not, as suggested, read out of the Act. The collective agreement then becomes a 'condition' of the Commission's 'approval' of the consolidation under the first sentence of §5(2)(f)

> and its provisions are deemed by the Commission to be 'a fair and equitable arrangement to protect the interests' of the employees within the meaning of the first sentence. Thus the significance of the 'notwithstanding' proviso is that it provides the machinery for the terms of a pre-merger collective agreement and thus supplies the minimum measure of fairness required under the first sentence of §5(2)(f)." *Norfolk & Western Ry. Co.* v. *Nemitz*, 78 LRRM at 2723.

Norfolk is authority for the proposition that the administrative agency approving a merger must consider the agreement reached by the representatives of the affected parties in contemplation of that merger and, if deemed by that agency to be a fair and equitable arrangement, incorporate that agreement into the order approving the merger. Clearly, the ICC was without authority to approve an inequitable agreement and therefore it had to pass upon the fairness of the agreement presented to it. As previously stated, in the instant case, the Civil Aeronautics Board has steadfastly refused to shoulder this basic reviewing task, choosing rather to shunt this determination off to an unnamed independent private third party arbitrator.

The central issue in *Norfolk* was both the authority and responsibility of the ICC (here, the CAB). The reason why the post-merger agreement failed was not, apparently, because it was unfair as a matter of law. Its defect was, rather, that it was in major conflict with the Commission's order *as it incorporated* the pre-merger agreement. This Court held that once the Commission had exercised its authority it could not abandon it to uncontrolled modification by third parties. It reaffirmed the fact that seniority integration secures its vitality from

action *by the Commission.* The *Norfolk* decision is directly contrary to the CAB's position that it can avoid its responsibility by simply pointing to some private dispute settlement procedure outside the administrative governmental framework.

The dissenting Justices in *Norfolk* expressed proper concern with the impact of that decision on the process of collective bargaining. However, we are certain that both the majority and dissent concur in their belief that the collective bargaining process is the preferred mode of settlement and that the Commission acted properly in approving the pre-merger agreements. Here the CAB did not even consider the agreement submitted to it. Then—despite the fact that there was no agreement for third party arbitration—the CAB moved on to its other concerns, leaving these critical issues to be determined by other authorities. *Norfolk's* emphasis on the Agency's own action certainly condemns this type of irresponsibility.

Conclusion

We believe that the Court's recent decision in the *Norfolk* case supports the instant petition for certiorari.

Respectfully submitted,

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